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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 609

AERONAUTICAL RADIO, INC., AIR TRANSPORT ASSOCIATION OF AMERICA, AIRCRAFT OWNERS AND PILOTS ASSOCIATION, BRANIFF AIRWAYS, INC., HEART O'WISCONSIN BROADCASTERS, INC., DAVID INGLE, JR., LAKE CENTRAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., NORTHWEST AIRLINES, INC., AND UNITED AIR LINES, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, AND FEDERAL COMMUNICATIONS COMMISSION, *Respondents*,

AMERICAN TRUCKING ASSOCIATION, INC., NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN MERCHANT MARINE INSTITUTE, INC., AND AMERICAN RADIO RELAY LEAGUE, INC., *Intervenors*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals entered July 10, 1964 (Appendix A, *infra*, pp. 1a-12a) is reported at 335 F. 2d 304. The FCC's Report and Order of May 8, 1963 and its Memorandum Opinion and Order of

October 7, 1963 (R. 140-172, 202-225)[1] are reported at 34 F.C.C. 811 and 28 F.R. 10911.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra,* pp. 13a-15a), styled "Decree," was entered on August 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Title V of the Independent Offices Appropriation Act of 1952, (5 U.S.C. § 140, 65 Stat. 290), approved August 31, 1951,[2] expresses the "sense of the Congress" that a wide variety of activities of all federal agencies should be "self-sustaining to the full extent possible" and purports to authorize the "head of each federal agency" to prescribe "such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable" for any activity falling within the broad scope of the statute, "taking into consideration" certain specified factors and "other pertinent facts," with all collections to be "paid into the Treasury as miscellaneous receipts." FCC Regulations, 47 C.F.R. § 1.1101-1.1119,[3] impose charges on the filing of applications for radio licenses, permits and certificates of public convenience or necessity. The question presented is whether said Section 140, the appropriation act rider, together with FCC regulations, Section

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[1] "R." refers to Petitioners' Appendix in the Court of Appeals.

[2] "Section 140" is used as a short designation for Title V, a "Fees and Charges" rider to the Independent Offices Appropriation Act of 1952, 5 U.S.C. § 140. Unless otherwise indicated, all emphasis herein is supplied.

[3] Originally numbered § 1.600 et seq.

1.1101 through 1.1119, are constitutionally effective as valid legislative authority for the FCC's imposition of charges against petitioners for the filing of applications for radio licenses.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act of 1952, 5 U.S.C. § 140, 65 Stat. 290 (August 31, 1951), reads as follows:

> "TITLE V—FEES AND CHARGES
>
> "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, assocations, organizations, partnerships, corporations or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing con-

tained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount or directing the disposition of any fee, charge, or price: *Provided further*, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price. Aug. 31, 1951, c. 376, Title V, § 501, 65 Stat. 290."

STATEMENT

Petitioner Aeronautical Radio, Inc. (ARINC), a corporation operated not for profit and engaged in rendering radio communication service to the nation's airlines for the safety and convenience of their operations, is required by the Communications Act of 1934, 47 U.S.C. § 301 et. seq., to obtain licenses and license renewals from the FCC in order to continue its operations. Other petitioners (or the members of petitioner associations) are similarly required by the Communications Act to obtain and maintain FCC licenses. The airline petitioners are required by the CAB and FAA to have FCC licensed airborne radio stations in order to engage in public air transportation.

In February, 1962, by a 4-3 vote, the FCC instituted a rule making proceeding in Docket 14507, looking toward the establishment of a comprehensive schedule of filing fees to accompany all applications for licenses, certificates, and permits which it issues (R. 3-9). As authority for this proposal, the FCC majority cited Section 140 (R. 3, 8).

Although the FCC invited written comments on its fee proposals, it did not permit oral argument or hold

a hearing, although requested to do so by ARINC (R. 66). "The vast majority" of the written comments received "were in opposition to the proposed schedule of fees" (R. 142). Despite this opposition, and the questionable statutory foundation, the FCC, with two Commissioners strongly dissenting, adopted a schedule of fees. (R. 140-172). Petitions for Rehearing were filed by certain petitioners and others (R. 173-193), which the FCC, by a divided vote, rejected in its Memorandum Opinion and Order (R. 202-225).[4]

As finally approved by the Commission, fees are required to accompany each application for most of the licenses, permits, etc., issued by the FCC. "All fees collected will be paid into the United States Treasury as miscellaneous receipts" and "will be charged irrespective of the Commission's disposition of the application." (47 C.F.R. § 1.1103(b), (d), R. 218).

Under this initial FCC fee schedule, ARINC will thus be forced to pay more than $10,000 annually into the United States Treasury in order to carry on its airlines communications business. Other petitioners will be similarly affected in varying degrees.

These petitioners appealed and the Court below upheld the FCC's action in all respects. The Court first considered, independently, whether Section 140 was a constitutionally valid delegation of legislative power, and it found that Section 140 complied with the constitutional essentials as set forth in *Yakus* v. *United States,* 321 U.S. 414 (1944). The Court next considered, independently, whether the Commission's rule making action imposing charges was valid, and it con-

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[4] A more complete discussion of the FCC opinions is contained in Appendix C, *infra,* pp. 18a-20a.

cluded that the FCC's regulations were not arbitrary or lacking in authority, despite an admitted disparity between Broadcast fees, which recover only 8% of applicable costs, and Safety and Special Service fees, which recover 72%.

REASONS FOR GRANTING THE WRIT

Under Section 140 and the FCC's rule making action, the long standing rights of petitioners under the Communications Act of 1934, as amended,[5] to obtain radio station licenses or permits, which are essential to the conduct of their operations, have now been modified, without any amendment to the FCC's charter statute, by the imposition of charges upon the filing of FCC applications. Petitioners contend that Section 140 and the agency's rule making action, considered together, and in light of a combination of delinquencies relating to both, constitute an ineffective legislative base for the imposition of charges against them.

Section 140 is unprecedented in the government-wide sweep of its delegation to all agencies of government. It is unprecedented by reason of the revenue raising nature of the delegation. It is unprecedented as an indirect amendment of all charter statutes of federal agencies. The grant of such broad power to the agencies in the casual manner of a discredited legislative rider to a 13-year old appropriation act is unprecedented. Section 140 is unprecedented by the absence of any provision for protesting the imposition of a levy or obtaining any refund or other procedure. The FCC's rule making action is unprecedented as the first effort of any federal agency over the intervening 13-year period to impose a comprehensive schedule of

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[5] 47 U.S.C. § 301 et. seq.

charges under Section 140 for the purpose of making its total regulatory activities partially self-sustaining. Section 140 and the FCC's rule making action, considered together, are unprecedented extremes in the maximum of delegation with a minimum of legislative consideration; and in the maximum of agency discretion with no procedural safeguard.

A consideration of Section 140 and the FCC's rule making action reveals an inversion of the legislative process. It was the FCC, not the Congress, which determined that charges would be imposed. The FCC, not Congress, decided to impose charges on the filing of applications, *not* on the granting of licenses or permits. The FCC, not Congress, decided who and what would be subject to charges and who and what would be exempt. The FCC, not Congress, determined the amount of charges to be levied. The FCC, not Congress, decided that charges for the filing of applications in the broadcasting service would be "nominal," but self-sustaining, or nearly so, in the safety and special radio services. It was the FCC, not Congress, which decided to levy flat charges rather than cost-related fees. The FCC, under the Court of Appeals opinion, may now legislate the imposition of new charges in any amount or for any purpose. Indeed, the FCC, with such uncontrolled discretion, is made a government unto itself in the matter of imposing charges.

The Court, in its opinion below, acknowledged that petitioners' challenge to the validity of Section 140, and the FCC's rule making action, was based on a "combination of factors." (App. A *infra,* p. 3a). But the Court, nevertheless, proceeded with a fragmented consideration, first, of the validity of Section

140 viewed as a normal delegation of regulatory power considered independently and in the abstract, and, second, with a consideration of the FCC's rule making action, considered independently and viewed as in conformity with a fully competent legislative enactment. In this fragmented consideration of the case, the Court below disregarded the multiple defects asserted by petitioners and showed no appreciation of the synergistic effect of the combination of delinquencies in Section 140 and the FCC's rule making action.[6] The opinion of the Court below reveals no awareness of the unprecedented nature and scope of the issues presented in this case, and it failed to make any distinction between this untoward delegation[7] of power for the purpose of raising revenue and the usual delegation of regulatory powers in regulatory statutes subject to proceedings before agencies and opportunity for judicial review.[8]

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[6] Cf. Mr. Justice Cardozo in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 319 (1932) ("The tokens of intention set down in this opinion have a force in combination that is denied to any one of them standing alone."); cf. also *Interstate Broadcasting Co.* v. *FCC*, 285 F. 2d 270, 272 (D.C. Cir. 1960).

[7] If Section 140 is not a case of "delegation running riot," it would be difficult to imagine such a case. See Mr. Justice Cardozo, concurring, *Schechter* v. *United States*, 295 U.S. 495, 553 (1935).

[8] The *Yakus* case, 321 U.S. 414 (1944), which the Court below principally relied upon, far from being a parallel with the instant proceeding, is actually a study in contrast. The Emergency Price Control Act and Inflation Control Act, under consideration in the *Yakus* case, were the products of fully considered legislation by responsible legislative Committees of the House and Senate on Banking and Currency, not a superficially considered legislative rider to an appropriation act. The delegation was to a single agency for a single purpose—the fixing of maximum prices—not a blunderbuss delegation to all agencies of government to impose charges, if they chose, on a variety of different activities. The Emergency Price Control Act, unlike Section 140, expressly provided for a

The problem of authorizing the imposition of charges by agencies is one which has been of active concern to the various Committees of the Congress for more than a decade. One aspect of this problem has to do with the distinction between proprietary and regulatory functions and the distinction between services of a private benefit nature in contrast to functions fundamentally governmental in character. Studies by various Committees of the Congress, as shown by Part 1 of Appendix C, have concluded that this problem is one which should be dealt with on an individual agency basis by the several legislative Committees of the Congress. The single exception to this policy is the 1951 action of the House Subcommittee on the Independent Offices Appropriation Act which reported out the "Fees and Charges" rider. That action was in violation of the rules and organization of the House and of the Senate, and in conflict with one of the main purposes of the Legislative Reorganization Act of 1946, 60 Stat. 812 (1946). In this instance, it was a gross circumvention of the regular legislative process. (House Rule XXI, § 2; Senate Rule XVI, §§ 2, 4).

The efforts by the Congress to outlaw the appropriation act rider abuse are detailed in Part 3 of Ap-

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hearing before the Price Administrator upon a protest to any maximum price regulation with a right to contest the agency's regulation and to obtain judicial review of that determination. Indeed, this due process provision was a key element in saving the delegation in the *Yakus* case. The opinion of the Court below showed no awareness that the specification of procedural safeguards is an essential feature in the permissibility of a delegation of authority to deprive persons of their rights or property. The omission from Section 140 of any right to protest the levy of a charge or to obtain a refund, or to be heard, on the agency's application of its levy in any particular case, is a fatal defect in the instant delegation.

pendix C. Experience has shown that the most formal efforts by the Congress to eliminate this abuse have proved ineffective. This is demonstrated by the enactment of Section 140 which far and away exceeds anything which has ever been attempted by a legislative rider to an appropriation act.[9] The versatility of the rider device is illustrated by the rider attached to the Supplemental Appropriation Act of 1951 for the purpose of rendering ineffective this Court's decision in *Wong Sang Sung* v. *McGrath*, 339 U.S. 33 (1950). See *Roccaforte* v. *Mulcahey*, 169 F. Supp. 360, 362-3 (D. Mass. 1958). When the rider device is used for comprehensive legislation such as Section 140, all opportunity for careful or responsible consideration of its import is lost, with the result that the performance of legislative functions is simply abdicated, and citizens are deprived of any opportunity to participate in the legislative process.[10]

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[9] *United States* v. *Dickerson*, 310 U.S. 554, 555-6 (1940) was decided before enactment of the Legislative Reorganization Act. Moreover, *Dickerson*, and the cases on which it relied, involved true "economy limitations", permitted under applicable Congressional rules, rather than substantive legislation granting new and sweeping revenue raising authority.

[10] The validity of the rules of the House and of the Senate is not at issue here, but rather the legal effect of their nonobservance and violation in this particular instance. The nonobservance of a House or Senate Rule is a justiciable issue. *United States* v. *Ballin*, 144 U.S. 1 (1892); *United States* v. *Smith*, 286 U.S. 6 (1932). Under the Legislative Reorganization Act, legislative powers are distributed among the various standing Committees, excluding the Appropriations Committees, and the rules of both houses prohibit the inclusion of any provision in appropriation bills "proposing new or general legislation" or "changing existing law". This is not merely a rule of procedure or internal convenience. Congress, by enacting the Legislative Reorganization Act of 1946, has done all that is practical for the legislative branch to do to eliminate the appropriation rider abuse, the most extreme example of which is

The FCC's rule making action demonstrates that all significant legislative-type determinations were left open-ended by Section 140. (R. 3-7; 140-164; 202-217). The FCC's action reveals also a disregard of key provisions of Section 140, and a disposition by the FCC to proceed on its own whether within or beyond the provisions of Section 140. In part, this is a reflection on the ambiguity, vagueness and incompleteness of the statute.

The things enumerated in Section 140 include "license, permit certificate," and the verbs used include "granted" and "issued." Nevertheless, the FCC chose to disregard these provisions and determined instead to levy charges on the mere filing of applications, regardless of whether acted upon or granted. But Section 140 contains no provision authorizing the imposition of charges on applications for any of the things listed.

The statute states an objective of making those things enumerated "self-sustaining to the full extent possible." But the FCC elected, at least in its initial action, to impose charges only at a level which would return to the government something less than 25% of the FCC's annual budget.

Section 140. Fullfillment of this intention of the Congress to set its own house in order is being obstructed by decisions of lower courts in reliance on the rule in the *Dickerson* case, 310 U.S. 554, without any consideration of the supervening enactment of the Legislative Reorganization Act, as for example in the opinion of the court below and in the *Roccaforte* case, *supra*. A reconsideration of the rule in the *Dickerson* case is warranted if the expressed intention of the Congress is to be realized. The nature of the legislative rider abuse is such that its effective elimination requires action by the judicial branch. Cf. *Baker* v. *Carr*, 369 U.S 186 (1962).

With respect to the provisions on "cost to the Government" and "value to the recipient," the FCC, at least with respect to the Broadcast services, conceded that its charges "do not accurately reflect cost to the government," or "the value conferred upon a recipient of a license." (R. 149). Instend, the FCC states, "The fees adopted herein resolve this dilemma by establishing flat charges. The Commission believes the flat fees to be a reasonable compromise because they are nominal." (ibid). Section 140, however, does not use the term "flat charges," or "nominal charges."

In the case of the numerous Safety and Special Radio Services, the FCC characterized its charges as "nominal," but it observed, "The net result is that the total fees to be collected bear a fair relationship to the cost of administering the Safety and Special Radio Services." (R. 152). Thus, the FCC, in the same rule making action under the same statute, conceded that its charges in the case of the Broadcasting services were not cost-related, whereas in the case of the Safety and Special Radio Services they were deemed cost-related. Whatever cost studies may have been made by the FCC in this matter, they were not made a part of the record, nor were they made available to the parties participating in the rule making proceeding.

Another illustration is the FCC's disregard of the statutory provision "fair and equitable" as between charges for the Broadcast class of applications and those in the Safety and Special Radio Services. It was revealed for the first time in Respondents' brief, filed with the Court below on April 11, 1964, that the FCC, in 1961, had made a cost study of operations in

"its major areas of responsibility."[11] This study essentially confirmed the facts which were presented to the Court below by petitioners and intervenors, namely that there was an inequitable disparity in the revenues to be derived from applications of the Broadcast services as contrasted to the revenues to be derived from applications in Safety and Special Radio Services. These facts established that the charges levied on applications in the Broadcasting services were so nominal that they would gross only 8% of the cost of administering the broadcast services, whereas the charges levied on applications on the Safety and Special Radio Services would yield 72%. This gross disparity, which is confirmed in the opinion of the Court below (App. A. *infra*, pp. 10a-11a), surprisingly was not considered by it to transgress the "fair and equitable" provision of the statute.[12]

Approval of such a breadth of discretion over matters legislative in nature as exercised in the FCC's rule making action now confirms in the FCC, and for that matter in other agencies of government, complete and total discretion over the imposition of charges in any amount for any reason, notwithstanding the absence of any provision on procedural rights. Indeed,

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[11] The FCC, so far as known, did not ascertain the cost of processing applications, e.g. in the aviation service, or ascertain the cost difference in processing applications for new stations in contrast to routine license renewals, the charges for which are the same. The FCC does not know whether its charges in some instances are in excess of processing costs.

[12] Indeed, under the holding below, the FCC, if it chose, could revise its charges so that 72% or more of the costs of Broadcast application processing would be recovered and 8% or less of those in the Safety and Special Radio Services. If the same criteria were followed in both classes, the charge on broadcasting applications would have to be increased tenfold. Appendix C *infra*, p. 20a.

the opinion of the Court below is without limitation or qualification in upholding not only Section 140, but even a broader sweep of agency discretion transcending its vague provisions.

CONCLUSION

This is a case of first importance directly to the FCC and all persons subject to its regulation, and indirectly to all other agencies in the executive and independent establishments and persons subject to their regulation. At issue here is the first action that any federal agency, without express authorization of the Congress, has taken to levy charges on persons regulated to offset agency expenditures for performing governmental regulatory functions. The introduction of such a radical departure into the federal regulatory systems, predicated solely on the claimed authority of Section 140, poses the above stated novel and important questions which should be considered and determined by this Court.

Respectfully submitted,

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